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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

JEFFREY MAREK, THOMAS WADYCKI and
LAWRENCE RHODE,

Petitioners,

- v. -

ALFRED W. CHESNY,

Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Seventh Circuit

BRIEF FOR AMICUS CURIAE
THE CITY OF NEW YORK

IN SUPPORT OF REVERSAL

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BRIEF FOR AMICUS CURIAE
THE CITY OF NEW YORK

INTEREST OF AMICUS CURIAE

The City of New York submits this brief in support of reversal of the judgment of the Seventh Circuit. As a consequence of the explosive growth

in the number of actions against the City and its employees pursuant to 42 U.S.C., section 1983,* the outcome of this case will have a significant impact upon the City. Maintaining that Rule 68 operates to preclude a civil rights plaintiff from recovering his own attorney's fees accrued following an unbeaten settlement offer, the City has utilized the rule in efforts to reach reasonable settlements early in litigation.** In Lyons v. Cunningham, 583 F. Supp.

*While specific data concerning the increase in civil rights suits against the City is not available, an increase can be inferred from nationwide statistics. The number of such suits increased from 7,679 in 1973 to 19,735 in 1983 (excluding state prisoner actions). See Annual Report of the Director of Administrative Office of the United States Courts, 1980 (Table 28); 1983 (Table 25).

**A determination that attorney's fees are "part of the costs" for purposes of Rule 68 does not compel the conclusion that a prevailing plaintiff who fails to obtain a judgment greater than a Rule 68 offer must pay the defendant's fees accrued after the offer. An unbeaten Rule 68 offer has the effect of mandatorily shifting to the plaintiff the defendant's costs. Fees, however, are a portion of the costs award which, by statute and case law, are always awarded at the discretion of the court. Thus, before a court could award fees to a defendant after an

(Footnote continued on next page)

1147 (S.D.N.Y. 1983), the District Court accepted the City's position, holding that the plaintiff was not entitled to obtain his attorney's fees pursuant to 42 U.S.C., section 1988, accrued subsequent to the City's Rule 68 offer of judgment. That case has been appealed to the United States Court of Appeals for the Second Circuit, which, with the consent of the parties, has adjourned the appeal pending this Court's resolution of the instant case.

(Footnote continued from previous page)

unbeaten Rule 68 offer, it would be required to find that the plaintiff's action was "unreasonable, frivolous, meritless or brought for a vexatious purpose." Christianburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978). Since Rule 68 itself comes into play only when there is a plaintiff's verdict for less than the amount of the offer (see Delta Air Lines, Inc. v. August, 450 U.S. 346 [1981]), the fee component of the defendant's costs would be shifted to the plaintiff only under the rare circumstances where the plaintiff's claim was "unreasonable, frivolous, meritless or brought for an improper purpose," but the plaintiff nonetheless prevailed. This is essentially the position taken by the District Court in Bitsouni v. Sheraton-Hartford Corp., 33 F.E.P. Cases 898 (D. Conn. 1983). See also Note, Rule 68: A "New" Tool for Litigation, 1978 Duke L.J. 889, 900.

It is our position that unless Rule 68, consistent with its purpose and intent, is held to limit attorney's fees as well as other costs in civil rights actions, it will have little or no impact and will lose its function of inducing early settlements. Attorneys confronted with reasonable offers will be able to ignore them, knowing that their fees will increase with the passage of time. This will result in cases being tried which need not be tried, unnecessary congestion in the courts, and the utilization of scarce government legal resources in cases which can and should be settled.

SUMMARY OF ARGUMENT

The Court below erred in concluding that Rule 68 does not bar the recovery of attorney's fees pursuant to 42 U.S.C., section 1988, accrued after the date of an unbeaten Rule 68 offer of judgment. The Court improperly reasoned that attorney's fees are not part of the costs and mistakenly perceived a

congressional intent not to reduce fee awards in civil rights actions.

In this country, when fees have been available, they have generally been awarded by statute and case law as part of the costs. In enacting section 1988, Congress followed this long established practice and explicitly made fees recoverable "as part of the costs." This ensured that state defendants would not be immune from a fee award by virtue of the Eleventh Amendment of the United States Constitution.

In rejecting an assertion of Eleventh Amendment immunity to a fee award by state defendants, this Court in Hutto v. Finney, 437 U.S. 678 (1978), concluded that Congress intended in section 1988 to make attorney's fees recoverable as part of the costs. Subsequent to Hutto, lower courts have, in several contexts, dealt with the issue of whether fees are a part of the costs. A majority has found that fees are costs for purposes of the timing of fee applications, as part of a release of all costs,

and in interpreting the relationship of Rule 68 to a fee application pursuant to section 1988.

There is nothing in the legislative history of section 1988 to indicate that Congress intended anything other than what it explicitly stated, i.e., allowing the prevailing party a reasonable attorney's fee "as part of the costs." Since Rule 68 had been part of the Federal Rules of Civil Procedure long before the enactment of section 1988, and given the significant public policy served by the Rule, it must be assumed, in the absence of clear legislative history to the contrary, that Congress determined not to exempt fee awards in civil rights cases from the provisions of the Rule. It follows that a civil rights plaintiff is barred from recovering his attorney's fees accrued after an unbeaten Rule 68 offer of judgment.

ARGUMENT

THE LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ATTORNEYS FEES ACT OF 1976, 42 U.S.C., SECTION 1988, INDICATES THAT CONGRESS MADE ATTORNEY'S FEES A PART OF THE COSTS IN CIVIL RIGHTS ACTIONS FOR ALL PURPOSES. THEREFORE, RULE 68 OF THE FEDERAL RULES OF CIVIL PROCEDURE BARS A PLAINTIFF FROM RECOVERING ATTORNEY'S FEES ACCRUED AFTER AN UNBEATEN OFFER OF SETTLEMENT MADE PURSUANT TO THE RULE.

When Congress enacted the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C., section 1988 ("section 1988"), it specifically provided that a reasonable attorney's fee would be available to the prevailing party "as part of the costs." Congress' choice of that formulation was not accidental. Rather, Congress was acting in an historical context in which statutory provisions for attorney's fees were customarily made as part of the costs. Also, Congress intended to make fee awards applicable to state defendants that might otherwise be immune from a money damage award by virtue of the

Eleventh Amendment of the United States Constitution.

Rule 68 has been included in the Federal Rules of Civil Procedure since 1938, and Congress was presumably aware of its existence at the time that section 1988 was passed. The legislative history of section 1988 demonstrates that Congress intended to make fees a "part of the costs" for all purposes. Thus, even in civil rights cases, Rule 68, by its terms, applies to attorney's fees and acts as a bar to their recovery in the appropriate circumstances.

A. Awards of Attorney's Fees Prior to Section 1988

Unlike England, where counsel fees have long been awarded to the successful litigant, the "American Rule" has been that the prevailing party does not usually recover his attorney's fees. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975); Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967). When fees have been allowed in this

country, whether by statute or case law, they have almost always been awarded as part of the costs.

In 1793, Congress enacted provisions allowing for an award of attorney's fees to the prevailing party as part of the costs in the federal courts. Act of March 1, 1793, 2nd Cong., 2nd Sess., ch. XX, 1 Stat. 332, §§1, 4. This act was allowed to expire in 1799, but the federal courts continued to award attorney's fees as part of costs where they were recoverable under state rules. In 1853, Congress acted to make the award of costs uniform nationally and to eliminate fee awards. Act of Feb. 26, 1853, 32nd Cong., 1st Sess., 10 Stat. 161. This Court consistently interpreted the 1853 act as having terminated the ability of the winner to recover attorney's fees as part of the costs from the losing party. See Flanders v. Tweed, 82 U.S. (15 Wall.) 450, 452-53 (1872); The Baltimore, 75 U.S. (8 Wall.) 377 (1869).

Without changing the American rule, Congress, over the next 120 years, did, however, allow for attorney's fees under a multitude of

statutes, and, when it did, it generally provided for fees to be recovered as part of costs. In the House debates over section 1988, Congressman Drinan included a list of 55 federal statutes which authorized the award of attorney's fees. 122 Cong. Rec. 35123 (1976). In 36 of those statutes, Congress provided for recovery of attorney's fees "as part of the costs." E.g., 7 U.S.C., §2305(a) (Agricultural Unfair Trade Practices Act); 42 U.S.C., §2000a-3(b) (Title II of the Civil Rights Act of 1964); 20 U.S.C., §1617 (Education Amendments of 1972); see also, e.g., 12 U.S.C., §1975 (Bank Holding Company Act); 15 U.S.C., §15 (Clayton Act); 18 U.S.C., §1964(c) (Organized Crime Control Act of 1970); 33 U.S.C., §1365(d) (Water Pollution Prevention and Control Act); 42 U.S.C., §300j-8(d) (Safe Drinking Water Act) (recovery of "the costs of the suit including reasonable attorney's fees" or similar language); 7 U.S.C., §210(f) (The Packers and Stockyard Act); 15 U.S.C., §77(k) (Securities Act of 1933); 47 U.S.C., §206 (Communications Act of 1934) (fees "taxed

and collected as part of the costs in the case" or similar language).

Most of these statutes did not generate much attorney's fees litigation. One statute which did was the Clayton Act, 15 U.S.C., §12, et seq., and court decisions under it were consistent with the legislative intent to make the fee award part of the costs. See, e.g., Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1312 (9th Cir. 1982); Baughman v. Cooper Jarrett, Inc., 530 F.2d 529 (3rd Cir. 1976), cert. denied sub. nom. Wilson Freight Forwarding Co., AKA Wilson Freight Co. v. Baughman, 429 U.S. 825 (1976); Twentieth Century Fox Film Corporation v. Goldwyn, 328 F.2d 190, 222 (9th Cir. 1964).

In addition to the specific statutory provisions for the recovery of attorney's fees, exceptions to the American rule were created by case law. For example, beginning in the early 1970's, the federal courts began to award fees in "private attorney general" cases, i.e., cases in which private individuals brought suit to vindicate public interests.

The courts took the position that, even absent specific statutory authority, they had the power under their equitable jurisdiction to award fees. Significantly, when the courts elected to award fees, they did so generally as part of the costs. One court described an award of costs as "analytically indistinguishable from one of attorney's fees." Class v. Norton, 505 F.2d 123, 126 (2d Cir. 1974); see also Skehan v. Board of Trustees Bloomsburg State College, 538 F.2d 53, 58 (3rd Cir. 1976); Thonen v. Jenkins, 517 F.2d 3, 7 (4th Cir. 1975); Brewer v. School Board of City of Norfolk, Virginia, 456 F.2d 943, 948 (4th Cir. 1972), cert. denied, 406 U.S. 933 (1972).

In Alyeska Pipeline Service Co. v. Wilderness Society, supra, 421 U.S. 240, this Court was confronted with the question of whether the award of such fees was permissible. After examining the history of various costs and fees statutes, the Court concluded that "it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation" in such a

fashion. 421 U.S. at 247. The Court, however, invited Congress to provide such legislation, and Congress accepted the invitation. See 42 U.S.C., §1988.

B. The Legislative History of the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C., Section 1988

Even before Alyeska was decided, Congress had been considering extending fee awards to the Reconstruction era civil rights statutes. Part of the purpose for doing so was to require state defendants to pay attorney's fees. Congress was concerned with this issue because there had been some question whether states and state employees could assert an Eleventh Amendment defense against fee awards. See generally Comment, Attorney's Fees and the Eleventh Amendment, 88 Harv. L. Rev. 1875 (1975).

While Congress was considering the legislation, this question was partially resolved in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), which, in

a Title VII action against a state defendant, authorized an award of attorney's fees pursuant to 42 U.S.C., section 2000e-5(k), which provided to the prevailing party "a reasonable attorney's fee as part of the costs." Two sponsors of the legislation, Senator Abourezk (see 122 Cong. Rec. 33315 [1976]) and Congressman Drinan (see 122 Cong. Rec. 35123 [1976]), and the House Report (H.R. Rep. 94-1558, 94th Cong., 2nd Sess., p. 7 n.14 [1976]) specifically referred to Fitzpatrick and to the intent of the bill to award costs against state defendants. The Senate Report was also quite specific regarding Congress' intent to ensure enforcement of the civil rights laws against the states though the award of reasonable attorney's fees as costs (S. Rep. No. 94-1011, 94th Cong., 2nd Sess., p. 5 [1976], reprinted in 1976 U.S. Code Cong. and Ad. News, 5908, 5913):

Fee awards are therefore provided in cases covered by S. 2278 in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5. As with cases brought under 20 U.S.C. §1617, the Emergency School Aid

Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases, it is intended that the attorneys' fees, like other items of costs,⁶ will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party). [one footnote omitted]

⁶Fairmont Creamery Co. v. Minnesota, 275 U.S. 168 [sic. 70] (1927).

The reference to Fairmont Creamery is significant. In that case, this Court held that states had no immunity to the imposition of costs. Its inclusion in this context is a clear expression of the intent of Congress to make fees recoverable from state defendants by making them recoverable as part of the costs and thus not subject to the Eleventh Amendment's provision for immunity to money damages.

In determining that attorney's fees would be recoverable as part of the costs so as to make fee

awards effective against states and their employees, Congress presumably made them costs for all other purposes. Nowhere in the debates, the detailed House and Senate Reports or the records of the subcommittee hearings in the Senate and House which preceded enactment of section 1988 is there the slightest hint that Congress intended either to have the section take precedence over the Federal Rules or otherwise to make fees part of the costs for some purposes but not for others.

If Congress had intended to denominate attorney's fees as costs to avoid the Eleventh Amendment problem but at the same time intended to exempt fees from the provisions of the Federal Rules, that intent, we submit, would have expressed itself in the legislative history.

The portion of the legislative history of section 1988 upon which the Court below relied in support of its conclusion that Congress did not intend to have Rule 68 apply to fees was quoted out of context. In discerning a congressional intent not to have fee awards reduced, the Court quoted the

following passage from the Senate Report, supra, p. 5, 1976 U.S. Code Cong. and Ad. News at 5912 (720 F.2d at 479):

"[P]rivate attorneys general" should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose.

However, that passage must be read in context with the language immediately following it (1976 U.S. Code Cong. and Ad. News at 5912):

Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes. [citations omitted]. This bill thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in "bad faith" under the guise of attempting to enforce the Federal rights created by the statutes listed in S. 2278.

It is clear that Congress was concerned with foreclosing the possibility that a plaintiff who brings a good faith civil rights action and loses might be

required to pay the defendant's attorney's fees. This is quite different from Rule 68 which merely cuts off fees accrued by the plaintiff's attorney after the plaintiff has continued to litigate despite receiving an offer larger than his ultimate recovery.*

C. Judicial Interpretation of Section 1988

In Hutto v. Finney, 437 U.S. 678 (1978), this Court rejected a state employee's claim of Eleventh Amendment immunity to a fee award. The ruling turned directly upon a finding that, pursuant to section 1988, attorney's fees had been intended by Congress to be recoverable as part of the costs. The Court noted the specific references in the legislative history that " 'fees, like other items of costs,' " should be collected from the appropriate officials. 437 U.S. at 694. The Court stated (437

*See, supra, p. 2n.**.

U.S. at 695):

The Act imposes attorney's fees "as part of the costs." Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity. The practice of awarding costs against the State goes back to 1849 in this Court

Citing Fairmont Creamery Company v. Minnesota, 275 U.S. 70 (1927), the Court continued (437 U.S. at 696-98):

Just as a federal court may treat a State like any other litigant when it assesses costs, so also may Congress amend its definition of taxable costs and have the amended class of costs apply to the States, as it does to all other litigants, without expressly stating that it intends to abrogate the States' Eleventh Amendment immunity. For it would be absurd to require an express reference to state litigants whenever a filing fee, or a new item, such as an expert witness' fee, is added to the category of taxable costs.

There is ample precedent for Congress' decision to authorize an award of attorney's fees as an item of costs. . . . In America, although

fees are not routinely awarded, there are a large number of statutory and common-law situations in which allowable costs include counsel fees. Indeed, the federal statutory definition of costs, which was enacted before the Civil War and which remains in effect today, includes certain fixed attorney's fees as recoverable costs. In Fairmont Creamery itself, the Court awarded these statutory attorney's fees against the State of Minnesota along with other taxable costs, even though the governing statute said nothing about state liability. It is much too late to single out attorney's fees as the one kind of litigation cost whose recovery may not be authorized by Congress without an express statutory waiver of the States' immunity. [footnotes omitted]

Although Hutto should have resolved the question of whether attorney's fees are part of costs, the issue reappeared in a dispute over the timing of a request for fees. The Courts of Appeals for the Fourth, Fifth, Sixth and Seventh Circuits held that since fees are by statute a "part of the costs," a fee application is an application for costs under F.R. Civ. P. 54(d) and 58, which do not provide a specific time period in which to move.

See Johnson v. Snyder, 639 F.2d 316, 317 (6th Cir. 1981); Gary v. Spires, 634 F.2d 772, 773 (4th Cir. 1980); Bond v. Stanton, 630 F.2d 1231, 1234 (7th Cir. 1980); Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir. 1980).

The Courts of Appeals for the First and Tenth Circuits held that since fees were more difficult to calculate than other costs, they could not be costs despite what Congress had provided. Fee requests, these Courts held, must therefore be made pursuant to F.R. Civ. P. 59(e) within ten days after entry of judgment. See Glass v. Pfeffer, 657 F.2d 252 (10th Cir. 1981); White v. New Hampshire Department of Employment Security, 629 F.2d 697 (1st Cir. 1980), rev'd, 455 U.S. 445 (1982). The Court of Appeals for the Eighth Circuit took a third approach, finding that fee requests were governed by local rules rather than the Federal Rules. See Obin v. District No. 9, Int'l Assoc. of Machinists and Aerospace Workers, 651 F.2d 574, 582 (8th Cir. 1981).

In White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982), this

Court partially resolved the issue holding that a motion for attorney's fees should not be made pursuant to Rule 59(e). However, while the Court declined to hold expressly that fee requests were motions for costs under Rules 54(d) and 58 (455 U.S. at 454 n.17), its holding is consistent with a determination that fees are part of costs, and subsequent courts have taken that position. See Spray-Rite Service Corporation v. Monsanto Company, 684 F.2d 1226, 1247-48 (7th Cir. 1982); Brown v. City of Palmetto, Georgia, 681 F.2d 1325 (11th Cir. 1982); cf. Metcalf v. Borba, 681 F.2d 1183 (9th Cir. 1982); Gautreaux v. Chicago Housing Authority, 690 F.2d 601 (7th Cir. 1982) (fees are not part of "costs" as that term is used in local rules).

In another context, the Second Circuit held that a release executed by the prevailing party as to all costs was also a release of attorney's fees. Brown v. General Motors Corp., 722 F.2d 1009 (2d Cir. 1983).

Those courts which have dealt with this question in the specific context of Rule 68 have

generally found that attorney's fees are costs in that context as in others. In Fulps v. City of Springfield, Tennessee, 715 F.2d 1088, 1092-93 (6th Cir. 1983), the Court concluded:

When Congress drafted 42 U.S.C. §1988, it described attorney's fees "as a part of the costs." Congress could have simply authorized the recovery of attorney's fees, but it chose to go further and characterize the fees as costs. Required, as we are, to construe the language of a statute so as to avoid making any word meaningless or superfluous, we conclude that Congress expressly characterized fees as costs with the intent that the recovery of fees be governed by the substantive and procedural rules applicable to costs. [footnote omitted]

See also Lyons v. Cunningham, 583 F. Supp. 1147 (S.D.N.Y. 1983); Waters v. Heublein, Inc., 485 F. Supp. 110 (N.D. Cal. 1979); Scheriff v. Beck, 452 F. Supp. 1254 (D. Col. 1978); Perkins v. New Orleans Athletic Club, 429 F. Supp. 661 (E.D. La. 1976).

Eschewing the weight of authority noted above, the Court below relied on Pigeaud v.

McLaren, 699 F.2d 401 (7th Cir. 1983), in which the plaintiff accepted an offer of one dollar "plus all costs and expenses." The offer also stated that it should not be "construed as an admission of liability." 699 F.2d at 402. The Court held that in view of the rejection of liability, the plaintiff was not a prevailing party and thus could not recover fees. It then determined that costs in the context of a Rule 68 offer did not include attorney's fees. Pigeaud, however, is not only contrary to the weight of authority, but, further, it is inconsistent with the Seventh Circuit's own earlier determinations in Spray-Rite Service Corporation v. Monsanto Company, supra, 684 F.2d at 1247-48, and Bond v. Stanton, supra, 630 F.2d at 1234, wherein the Court held that attorney's fees are costs for the purpose of the timing of fee applications.*

*The Court below also relied on Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), which involved 28 U.S.C., section 1927, a different statute. Roadway Express is discussed at length and distinguished in both petitioners' brief and the brief of amicus curiae, the State of Florida.

Pigeaud and the decision in the instant case are also inconsistent with the basic principles of statutory construction that a statute should be given its obvious and rational meaning and that it should be presumed that Congress understood the meaning of the words it used. United States v. Goldenberg, 168 U.S. 95, 103 (1897). While Congress undoubtedly has the power to exempt attorney's fees from the provisions of the Federal Rules, and specifically from Rule 68, nothing in the legislative history indicates that it chose to do so. Absent a " 'clear inconsistency' or a demonstrated congressional purpose to exclude one or more of the Federal Rules, 'a subsequently enacted statute should be construed so as to harmonize with the Federal Rules if that is at all feasible.' " Grossman v. Johnson, 674 F.2d 115, 123 (1st Cir. 1982); see also In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1134 n.50 (7th Cir. 1979); United States v. Gustin-Bacon Division, Certainteed Products Corporation, 426 F.2d 539 (10th Cir. 1970),

cert. denied, 400 U.S. 832 (1970); 7 Moore's Federal Practice, ¶ 86.04[4], p. 86-22.

We submit that when Congress elected to award fees "as part of the costs" (42 U.S.C., §1988), it meant what it said.* See Hutto v. Finney, *supra*, 437 U.S. 678. This is particularly true in the instant case. Given the significant public policy served by Rule 68 - expediting the litigation process by encouraging the settlement of cases which should be settled - any attempt to carve out an exception to its terms on the basis of subject matter must be based on the clearest expression of intent. As we have noted, such an expression is absent from the legislative history of section 1988. That history suggests, rather, that Congress intended attorney's fees to be costs for all purposes. A civil rights plaintiff, therefore, is barred from recovering fees

*Otherwise, state defendants in civil rights actions would be barred from asserting Eleventh Amendment immunity to a fee award because fees are part of costs, but would be unable to take advantage of Rule 68 because fees are not part of costs.

accrued subsequent to an unbeaten offer of judgment made pursuant to Rule 68.

CONCLUSION

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED, AND THE ORDER OF THE DISTRICT COURT SHOULD BE REINSTATED.

Respectfully submitted,

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